

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

A.P. DEAUVILLE,LLC,

No. C14-03343 CRB

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS COUNTERCLAIMS**

v.

ARION PERFUME AND BEAUTY, INC.,

Defendant.

A.P. Deauville, LLC (“Plaintiff”) brought federal and state law claims for false advertising and unfair competition against Arion Perfume & Beauty, Inc. (“Arion”) and Does 1 through 10 (collectively, “Defendants”). Defendants filed counterclaims against Plaintiff. See SAA (dkt. 38) at 10-22. The Court today held a hearing on Plaintiff’s motion to dismiss Defendants’ counterclaims. See generally MTD (dkt. 47). As explained below, the Court GRANTS IN PART and DENIES IN PART Plaintiff’s motion to dismiss.

I. BACKGROUND

Plaintiff “produces, markets, and sells Power Stick brand deodorant, antiperspirant, body spray, and body wash[,] which it sells exclusively at value-priced retailers.” Compl. (dkt. 1) ¶ 9. Defendants sell “European American Design (“EAD”) men’s deodorant, deodorant spray, and body wash products[,] . . . which compete with Plaintiff’s [products].” Id. ¶¶ 11-13. Plaintiff claims that the EAD product labels “contain false and misleading

statements or otherwise fail to meet the requirements for product labeling in the United States,” that consumers are “likely to be misled and deceived[,]” and that Defendants’ false and misleading labeling “is damaging to the reputation, goodwill, and sales of Plaintiff” Id. ¶¶ 13, 29-30.

Defendants assert in their counterclaims that Plaintiff’s Power Stick products also contain false or misleading statements, and that Plaintiff’s Power Stick Cool Blast product does not comply with numerous Food & Drug Administration (“FDA”) regulations.¹ SAA at 11-17. Significantly, Defendants claim that Plaintiff’s Power Stick product labels are misleading because the statement “Made in the U.S.A. of U.S. and/or imported ingredients” is ambiguous. Id. at 11. Defendants assert that consumers will believe that the Power Stick products contain domestic ingredients when, because of the “and/or” language, there is no guarantee that any ingredients are domestic.² Id. Because the Federal Trade Commission (“FTC”) only requires language that clarifies the origin of a product’s ingredients if the product is not all, or virtually all, comprised of domestic parts, Defendants contend that Plaintiff’s use of qualifying language gives rise to an inference that the Power Stick products contain more than a de minimis amount of foreign content. Id. at 11-14. Plaintiff also advertises online using statements such as “Why we are made in America[,]” without clarifying whether the product ingredients are domestic or foreign. Id. at 11-13. Defendants maintain that because Plaintiff’s use of qualifying language on the Power Stick product labels gives rise to an inference that the products contain more than a de minimis amount of foreign content, Plaintiff’s unqualified statements violate FTC guidelines and fail to adequately prevent consumer deception. Id.

On July 23, 2014, Plaintiff brought suit against Defendants, alleging violations of the Lanham Act and California Business and Professions Code sections 17200 and 17500. See

¹ The alleged FDA violations include failure to list the Power Stick Cool Blast product with the FDA, failure to adequately provide a Statement of Identity on the display panel, and various other format and content requirement failures including using too small a font, incorrect placement of warnings, and improper punctuation. SAA at 14-17.

² The SAA also claims that Plaintiff’s U.S. origin statement is “false or misleading,” but there is no serious argument that Plaintiff’s products are not manufactured domestically. See SAA 10-18; see generally Opp’n.

1 generally Compl. On August 29, 2014, Defendants filed an answer, see generally Answer
 2 (dkt. 12), which Defendants amended on September 19, 2014 to include counterclaims
 3 against Plaintiff, see generally FAA (dkt. 29). On October 10, 2014, Plaintiff filed a motion
 4 to dismiss Defendants' counterclaims. See generally MTD FAA (dkt. 34). On October 24,
 5 2014, Defendants amended their counterclaims. See SAA at 10-22. Plaintiff now moves to
 6 dismiss Defendants' amended counterclaims. See generally MTD.

7 **II. LEGAL STANDARD**

8 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the
 9 complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003) (citing Fed. R.
 10 Civ. P. 12(b)(6)). Dismissal is proper if a complaint fails to state a claim upon which relief
 11 can be granted. Fed. R. Civ. P. 12(b)(6). To survive dismissal, a complaint must contain
 12 factual allegations sufficient to "state a claim to relief that is plausible on its face." Ashcroft
 13 v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
 14 (2007)). When determining plausibility, allegations pertaining to material facts are accepted
 15 as true for purposes of the motion and construed in the light most favorable to the non-
 16 moving party. Wyler-Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir.
 17 1998). If dismissal is ordered, the plaintiff should be granted leave to amend unless it is clear
 18 that the claims could not be saved by amendment. Swartz v. KPMG LLP, 476 F.3d 756, 760
 19 (9th Cir. 2007).

20 **III. DISCUSSION**

21 Plaintiff moves to dismiss Defendants' counterclaims, which allege false advertising
 22 in violation of the Lanham Act § 43(a) and California Business and Professions Code,
 23 § 17500 et seq., and unfair competition in violation of California Business and Professions
 24 Code § 17200 et seq. See generally MTD; SAA. Specifically, Defendants argue that: (1) the
 25 statement "Made in the U.S.A. of U.S. and/or imported ingredients" on all of Plaintiff's
 26 Power Stick products is misleading; (2) Plaintiff's use of unqualified statements of U.S.
 27 origin in its advertising is misleading; and (3) Plaintiff's Power Stick Cool Blast product
 28 violates numerous FDA labeling requirements. See SAA at 10-21.

As explained below, Defendants fail to state a claim for false advertising and so the Court will GRANT Plaintiff's motion to dismiss the first two causes of action with prejudice. Because Defendants' third cause of action, specifically as it relates to Power Stick Cool Blast's alleged labeling violations, states a plausible claim, the Court will DENY Plaintiff's motion to dismiss Defendants' unfair competition claim.

A. U.S. Origin Claims

Plaintiff moves to dismiss Defendants' first and second causes of action, which allege that Plaintiff's U.S. origin statements are misleading. See generally MTD; SAA at 19-20. Plaintiff argues that Defendants do not have any factual basis for their claims. MTD at 7-8; Reply (dkt. 51) at 4-6. Defendants argue that they state a claim based on Plaintiff's use of "and/or" language and its use of both unqualified and qualified statements of U.S. origin. Opp'n (dkt. 50) at 4-6.

The parties primarily dispute whether Defendants have adequately stated a false advertising claim under Lanham Act § 43(a), Defendants' first cause of action.³ See generally SAA; MTD; Opp'n. Plaintiff argues that, because its products contain no more than a de minimis amount of foreign content, both its unqualified and qualified statements of U.S. origin comply with the FTC's guidelines and are not misleading to consumers. MTD at 7-8; Reply at 4-6.⁴ Plaintiff goes on to argue that whether Plaintiff complies with the FTC guidelines is not provably false and that, without any other factual basis supporting Defendants' claim, Defendants cannot maintain a private right of action requiring Plaintiff to substantiate its statements. Id. Defendants argue that Plaintiff's products contain more than a de minimis amount of foreign content, that whether Plaintiff complies with the FTC guidelines is provably false, and that Defendants are therefore entitled to a private right of action. Opp'n at 4-6.

³ Defendants also argue that, because they have established a plausible claim under the Lanham Act, they are entitled to relief under Cal. Bus. & Prof. Code § 17500, Defendants' second cause of action. Opp'n at 11 (citing J.K. Harris & Co., LLC v. Kassel, 253 F. Supp. 2d 1120, 1130 n.9 (N.D. Cal. 2003)).

⁴ Plaintiff also argued at the motion hearing that the counterclaim failed under Iqbal because it amounts to a mere statement of falsity without any factual basis alleged.

1 1. Federal Trade Commission Policy On U.S. Origin Statements

2 To succeed on a false advertising claim under the Lanham Act, Defendants must
3 prove the following: (1) there is a false statement of fact; (2) the statement actually deceived
4 or has the tendency to deceive consumers; (3) the deception is likely to influence the
5 purchasing decision; (4) Plaintiff caused its false statement to enter interstate commerce; and
6 (5) Defendants have been or are likely to be injured as a result of the false statement.
7 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (citation
8 omitted).⁵ Primarily at issue here are the elements of falsity and deception.

9 The FTC has authority under Section 5 of the FTC Act, 15 U.S.C. § 45, to regulate
10 claims of U.S. origin in advertising. See generally 62 Fed. Reg. 63756 (Dec. 2, 1997). The
11 FTC recognizes two types of U.S. origin statements: unqualified and qualified. Id. An
12 unqualified statement claims only that the product is of U.S. origin, while a qualified
13 statement goes on to explain the source of the ingredients.⁶ Id. The FTC distinguishes
14 between statement types because consumers expect that products labeled with unqualified
15 statements of U.S. origin contain a high amount of U.S. content. Id. at *63763.
16 Accordingly, the FTC permits unqualified statements of U.S. origin only when “all or
17 virtually all” of the ingredients are domestic; that is, the product must contain no more than a
18 de minimis amount of foreign content. Id. at *63756.

19 To satisfy the FTC standard for unqualified statements, the FTC policy requires that
20 the final assembly of the product take place in the United States. Id. at *63768. But the FTC
21 also considers other factors, including “the portion of the product’s total manufacturing costs
22 that are attributable to U.S. parts and processing” and “how far removed from the finished
23

24 ⁵ Defendants rely on the FTC’s analysis of U.S. origin claims in order to establish the element of consumer
25 deception required for Lanham Act claims. See SAA at 13. Defendants argue that reliance on the FTC’s analysis of such
26 statements is appropriate because the FTC has conducted significant research concerning consumers’ understanding of U.S.
27 origin statements in furtherance of its mission to protect consumers from misleading statements. Id.; Opp’n at 3; see 62 Fed.
Reg. 63756. Plaintiff does not disagree with Defendants. See MTD at 1, 6-8. Plaintiff argues that only the FTC may
determine whether Plaintiff’s U.S. origin statements comply with the FTC’s guidelines and whether consumers are deceived
as a result. Id.

28 ⁶ Examples of qualified statements include “Made in USA of U.S. and imported parts” and “Manufactured in U.S.
with Indonesian materials.” Id. (emphasis added).

product the foreign content is.” Id. at *63768-69. “[T]here is no single ‘bright line’ to establish when a product is or is not ‘all or virtually all’ made in the United States[.]” Id.

2. Plaintiff’s U.S. Origin Statements

It is undisputed that Plaintiff’s Power Stick product labels contain a qualified U.S. origin statement (“of U.S. and/or imported ingredients”) and that Plaintiff advertises using unqualified statements (“manufactured in the USA”). SAA at 10-12; see generally MTD. Plaintiff’s principal argument is that its use of both unqualified and qualified statement types is not misleading because the Power Stick products contain no more than a de minimis amount of foreign content and the statements comply with FTC requirements. MTD at 6-8; Reply at 2-3; see generally 62 Fed. Reg. 63756. Plaintiff goes on to argue that whether Plaintiff’s statements are in compliance with the FTC guidelines is a matter that can only be determined by the FTC and that, without any other factual basis supporting Defendants’ claim of false advertising, Defendants cannot maintain a private right of action. MTD at 6-8; Reply at 4-6. The Court, Plaintiff argues, should not allow Defendants “to step into the shoes of the government and act to enforce the FTC Act” See id. (citing, e.g., Bronson v. Johnson & Johnson, Inc., No. 12-4184, 2013 WL 5731817 CRB (N.D. Cal. Oct. 22, 2013) (private plaintiffs cannot seek to enforce FTC policy and cannot require defendants to substantiate their claims without providing additional factual support demonstrating that the claim is provably false)).

Defendants do not question whether Plaintiff’s products are manufactured domestically. See generally SAA. Rather, Defendants claim that, because manufacturers are only required by the FTC to qualify their U.S. origin claims when their products contain more than a de minimis amount of foreign content, Plaintiff’s use of both unqualified and qualified statements creates an inference that Plaintiff’s products contain more than a de minimis amount of foreign content, which would require sufficient qualification in order to avoid consumer confusion. SAA at 10-12; Opp’n at 4-6; see 62 Fed. Reg. 63763. Defendants go on to argue that Plaintiff’s unqualified statement is therefore misleading, according to the FTC’s policy, and, additionally, that Plaintiff’s qualified statement is not

1 sufficiently clear because of the use of “and/or” language.⁷ Id. Defendants argue that they
 2 are entitled to a private right of action because their claim is not a substantiation claim, but a
 3 provable falsehood. Opp’n at 5. Defendants argue that whether the Power Stick products
 4 contain sufficient foreign content to be misleading to consumers is “straight forward.” Id.;
 5 see, e.g., Bronson, 2013 WL 5731817. The Court disagrees.

6 FTC policy states that “there is no single ‘bright line’ to establish when a product is or
 7 is not ‘all or virtually all’ made in the United States” 62 Fed. Reg. *63768-69. Even if
 8 Plaintiff was forced to provide all available information regarding its Power Stick
 9 ingredients, neither the parties nor the Court would be in a position to determine whether
 10 there was sufficient foreign content to satisfy the FTC’s standard. See generally id. at
 11 *63756; see also Honeywell Int’l Inc. v. ICM Controls Corp., No. 11-569, 2014 WL
 12 4248434 JNE/TNL, at *12 (D. Minn. Aug. 27, 2014) (discussing the subjective nature of the
 13 FTC policy regarding U.S. origin statements). Whether Plaintiff is in compliance with FTC
 14 policy, and whether consumers are deceived as a result, is therefore not provably false. See,
 15 e.g., Bronson, 2013 WL 5731817, at *4 (claims relying on a lack of supporting evidence are
 16 construed as substantiation claims and are insufficient).

17 While Plaintiff’s U.S. origin statements could be misleading to consumers if the
 18 products indeed contain more than a de minimis amount of foreign content, the false
 19 advertising standard requires that Defendants’ counterclaims contain some evidence
 20 suggesting that confusion can actually be proven. SAA at 10-12; Opp’n at 5; see, e.g.,
 21 Bronson, 2013 WL 5731817 (granting the defendants’ motion to dismiss because the
 22 plaintiffs’ claim, which failed to cite any authority contradicting the defendants’ advertising
 23 statements, was a substantiation claim and therefore insufficient). Defendants suggest that
 24 Plaintiff’s U.S. origin statements are misleading when examined in the context of the FTC’s

25
 26 ⁷ While Plaintiff’s use of both statement types and use of “and/or” language could be confusing to consumers,
 27 Defendants raise both arguments solely in the context of the FTC’s policy. See Opp’n at 4-10 Both arguments rely on
 28 Plaintiff’s products being ineligible for an unqualified statement of U.S. origin, according to FTC policy, because they contain
 more than de minimis foreign content. See generally 62 Fed. Reg. 63756. The FTC would likely not consider Plaintiff’s use
 of an unqualified statement, and use of an ambiguous qualified statement, a danger to consumers if the Power Stick products
 contain “all or virtually all” domestic ingredients. Id.

1 policy on U.S. origin statements, but whether Plaintiff's statements comply with FTC policy
 2 cannot be proven in this Court. See generally 62 Fed. Reg. *63756; see also Honeywell Int'l
 3 Inc., 2014 WL 4248434 JNE/TNL, at *12. The Court does not wish to become the
 4 handmaiden of the FTC, nor does it imagine that the FTC would welcome the help. Because
 5 Defendants do not suggest an alternative avenue by which they might plausibly prove that
 6 Plaintiff's U.S. origin statements mislead consumers, Defendants fail to adequately allege
 7 falsity or a likelihood of deception, and therefore fail to state a provable, false advertising
 8 claim. Id.; Ashcroft, 556 U.S. at 678 (quotation omitted).

9 Accordingly, the Court GRANTS Plaintiff's motion to dismiss Defendants' first cause
 10 of action. Because Defendants make the identical argument to support their second cause of
 11 action, the Court GRANTS Plaintiff's motion to dismiss Defendants' second cause of action.
 12 Defendants have amended their counterclaims once before. See generally FAA; SAA.
 13 Moreover, Defendants did not represent at the motion hearing that they could amend their
 14 counterclaims to address this issue. Accordingly the Court's dismissal is with prejudice.

15 **B. FDA Violations**

16 Plaintiff next moves to dismiss Defendants' third cause of action, which alleges unfair
 17 competition. SAA at 20-21; see Cal. Bus. & Prof. Code § 17200. Plaintiff claims that: (1)
 18 Defendants lack standing because they failed to adequately claim any injury tied to the
 19 alleged labeling violations; (2) Defendants cannot claim competitive harm because their
 20 products also violate FDA labeling requirements; and (3) Defendants do not sell
 21 antiperspirants and, so, could not be harmed by any alleged antiperspirant labeling violation.
 22 MTD at 11-13. Defendants argue that: (1) they sufficiently allege injury; (2) the Court
 23 cannot assume that Defendants also violated FDA requirements; and (3) Plaintiff's Power
 24 Stick Cool Blast product is labeled as both an antiperspirant and a deodorant and whether
 25 Plaintiff's product competes with Defendants' products is a matter of fact. Opp'n at 13-15.
 26 For the reasons stated below, the Court agrees with Defendants that they have stated a
 27 plausible claim.

28 A party can bring a claim under California's Unfair Competition Law ("UCL") if it

1 can establish injury in fact. AngioScore, Inc. v. TriReme Med., LLC, No. 12-3393, 2014
 2 WL 4438082, at *7 (N.D. Cal. Sept. 9, 2014) (citing Cal. Bus. & Prof. Code § 17204). At
 3 the pleading stage, general allegations of injury resulting from the defendant's conduct are
 4 sufficient. Hinojos v. Kohl's Corp., 718 F.3d 1098, 1104 (9th Cir. 2013) (citing Kwikset
 5 Corp. v. Superior Court, 51 Cal. 4th 310, 327 (2011)).

6 Defendants claim that Plaintiff's Power Stick Cool Blast violates numerous FDA
 7 requirements for over-the-counter ("OTC") drugs, in violation of the UCL.⁸ SAA at 14-18,
 8 20-21. Defendants allege that Plaintiff is able to charge less than Defendants for similar
 9 products by "skirting labeling requirements[.]" thus retaining greater profit. Id. at 18.
 10 Defendants allege that because of its increased profit, Plaintiff is able to do more marketing
 11 and advertising. Id. Defendants allege that in so doing, Plaintiff unfairly gains market
 12 power, diverts customers away from Defendants, and injures Defendants' relationships with
 13 existing or potential customers.⁹ Id.

14 Plaintiff's first argument is that Defendants' alleged injury is too "far removed from
 15 any actual product competition[.]" "lack[s] any factual support[.]" and is "insufficient to
 16 confer standing." MTD at 11-13; Reply at 8. As support, Plaintiff cites McCabe v. Floyd
 17 Rose Guitars, No. 10-581, 2012 WL 1409627 JLS, at *9 n.4 (S.D. Cal. Apr. 23, 2012), which
 18 requires claimants to allege a "plausible chain of injury." Reply at 8. McCabe is not
 19 analogous.

20 In McCabe, the plaintiff argued that consumers would have purchased licenses from
 21 him had the defendant not fraudulently induced consumers to purchase defendant's license.
 22 2012 WL 1409627, at *9 n.4. The court observed that there was no connection between the
 23 plaintiff's patent and the defendant's patent and that, even assuming that the defendant's
 24 patent was invalid, consumers would be more likely to purchase licenses from the prior art

26 ⁸ Defendants also argue that Plaintiff's alleged false advertising violates the UCL. SAA at 20-21. Because the
 27 Court is dismissing Defendants' false advertisement claims, it analyzes Plaintiff's third cause of action solely in the context
 of the Power Stick Cool Blast's alleged FDA labeling violations.

28 ⁹ Defendants' alleged injuries are nearly identical to Plaintiff's alleged injuries for the UCL violation alleged in the
 Complaint. Compare Compl. ¶¶ 38-58 with SAA at 17-21.

1 patent holders than from the plaintiff. Id. The plaintiff thus failed to allege a “plausible
2 chain of injury.” Id.

3 Here, unlike in McCabe, Defendants have alleged a “plausible chain of injury.”
4 Defendants allege that their products compete directly with Plaintiff’s Power Stick Cool
5 Blast product, that Plaintiff’s product labeling violates numerous FDA regulations, that
6 Plaintiff avoided costs by “skirting” the FDA requirements, and that Plaintiff was able to
7 both divert market share away from Defendants and to damage Defendants’ goodwill with
8 existing and potential customers. See SAA at 8; see also AngioScore, Inc. v. TriReme Med.,
9 LLC, No. 12-3393, 2014 WL 4438082 YGR, at *7 (N.D. Cal. Sept. 9, 2014) (“Loss of
10 business to a competitor as a result of unfair competition is a paradigmatic, and indeed the
11 original, variety of loss contemplated by the UCL.”) (citation omitted). These general
12 allegations of economic injury resulting from Plaintiff’s conduct are sufficient at the pleading
13 stage. Hinojos, 718 F.3d at 1104 (citations omitted).

14 Plaintiff’s second argument, which is essentially an unclean hands argument, and
15 Plaintiff’s third argument, which is that the parties’ products do not actually compete, both
16 require that the Court make assumptions in favor of the moving party. MTD at 11-13.
17 Plaintiff’s arguments would require the Court to assume as true Plaintiff’s assertion that
18 Defendants’ products violate FDA labelling requirements, see generally Compl., and assume
19 as false Defendants’ factual allegation that the parties’ products compete, see SAA at 18.
20 This is improper. For the purposes of this motion, the Court must accept as true Defendants’
21 factual allegations and construe the facts in the light most favorable to Defendants, the non-
22 moving party. See Wyler-Summit P’ship, 135 F.3d at 661. Because Defendants have
23 standing and because the Court must not make assumptions in favor of the moving party, the
24 Court DENIES Plaintiff’s motion to dismiss Defendants’ third cause of action.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the Court GRANTS Plaintiff’s motion to dismiss
27 Defendants’ first and second causes of action for false advertising, with prejudice, and
28 DENIES Plaintiff’s motion to dismiss Defendants’ third cause of action for unfair

1 competition.

2 **IT IS SO ORDERED.**

3 Dated: December 12, 2014



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE